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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)

Petition of U S WEST, Inc. for)
Declaratory Ruling Preempting State)
Commission Proceedings to Regulate)
U S WEST's Provision of Federally Tariffed)
Interstate Service)
_____)

CC Docket No. 00-51

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**AT&T's RESPONSE TO U S WEST'S
PETITION FOR DECLARATORY RULING**

Pursuant to the Commission's March 24, 2000 Public Notice,¹ AT&T Corp.

("AT&T") submits this response to U S WEST, Inc.'s ("U S WEST's") Petition for Declaratory Ruling dated December 15, 1999 (the "Petition"). As shown below, U S WEST has failed to satisfy the Commission's well-established standards for declaratory relief, and the Petition should therefore be denied.²

¹ Public Notice, "Pleading Cycle Established for Comments on U S WEST Petition for Declaratory Ruling Preempting State Commission Proceedings to Regulate Provision of federally Tariffed Interstate Service", CC Docket No. 00-51 (DA 00-679, released March 24, 2000)

² It is settled law that a contested issue may not be resolved through a declaratory ruling unless undisputed facts and governing law entitle the petitioner to relief. See, e.g., American Network, Inc. (Petition for Declaratory Ruling Concerning Backbilling of Access Charges), 4 FCC Rcd 550, 551 (Com.Car.Bur. 1988)(¶ 18); Competitive Telecommunications Association (Petition for Declaratory Ruling), 4 FCC Rcd 5364, 5365 (Com.Car.Bur. 1989) (¶ 7). Indeed, just last year, the Commission denied a request by AT&T for a declaratory ruling concerning its duty to purchase access from so-called competitive local exchange carriers ("CLECs"), because the relevant facts and the applicable law were disputed by the parties. Access Charge Reform, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 96-206, released August 27, 1999 (¶ 190). As AT&T shows in this Response, the posture of this case is equally unsuited for declaratory relief.

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In August 1999, AT&T filed complaints against U S WEST before the state public utility commissions in Arizona, Colorado, Minnesota, New Mexico, and Washington (the “State Complaints”), seeking redress for U S WEST’s continuing deficient provisioning of access services.³ As set forth more fully in the State Complaints, U S WEST often is unwilling or unable to provide the access services AT&T requires; U S WEST frequently fails altogether to provide the facilities necessary for exchange access; and, when U S WEST does provide facilities, it often does so on an untimely basis, violating not only the performance standards agreed upon by U S WEST and AT&T, but also the provisioning process set forth in its own tariffs. In addition, U S WEST unlawfully and improperly discriminates in favor of itself, its affiliates, and its own customers, to the detriment of AT&T and its customers, in the provisioning of facilities.

Rather than defend against the State Complaints based on the merits of the dispute, U S WEST filed its Petition with the Commission requesting that the “Commission issue a declaratory ruling that proceedings recently brought by AT&T before five state public utilities commissions . . . are preempted by federal law.” Petition at 1. U S WEST claims that the Communications Act provides for exclusive federal jurisdiction over the facilities in question because they have been ordered by AT&T out of U S WEST’s interstate access tariffs filed with

³ See Matter of Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service, Docket No. P421/C-99-1183 (Minn. P.U.C.); Matter of Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service, Docket No. T-02428A-99-0476, T-01051B-99-0476 (Arizona Corp. Comm’n); AT&T Communications of the Mountain States, Inc. v. U S WEST Communications, Inc., Docket No. 99F-404T (Colorado P.U.C.); Matter of the Complaint and Request for Expedited Treatment of AT&T Communications of the Pacific Northwest, Inc. Against U S WEST Communications, Inc. Regarding Provisioning of Access Services, Docket No. UT-991292 (Wash. Util. & Transport. Comm’n); AT&T Communications of the Mountain States, Inc. v. U S WEST Communications, Inc., (New Mexico Pub. Reg. Comm’n).

the Commission. The Petition also asserts that the Commission must preempt the state public utilities commissions from regulating U S WEST's provisioning of these facilities to prevent interference with the federal regulation of interstate access services. U S WEST further claims that Section 20(c) of the Communications Act and the application of "filed rate" doctrine to U S WEST's interstate tariffs preclude the state commissions from entertaining AT&T's provisioning claims.

U S WEST's claim of exclusive federal jurisdiction over the quality its provisioning of special access services ordered from its interstate tariff is seriously misplaced. In fact, the Commission shares concurrent jurisdiction over those facilities with state regulatory authorities in light of their multi-jurisdictional character. Specifically, although the Commission's separations rules provide for direct assignment to the interstate jurisdiction of special access lines on which more than 10 percent of the traffic is interstate⁴ – and, hence, the tariffs for those services are filed with the Commission – U S WEST cannot dispute that significant volumes of intrastate traffic may also be carried on those same facilities.⁵ Clearly, state regulatory authorities have a substantial and entirely legitimate interest in assuring satisfactory service quality and performance by U S WEST with respect to such intrastate traffic.⁶

⁴ See 47 C.F.R. § 36.154.

⁵ Indeed, although the separations rules (*id.*) require direct assignment of these services to the interstate jurisdiction, in theory the overwhelming majority (as much as 89 percent) of the traffic may be jurisdictionally intrastate.

⁶ See, e.g., A.R.S. § 40-321 (permitting Arizona Corporation Commission to determine "just, reasonable, safe, proper, adequate or sufficient" facilities and service) A.R.S. § 40-331 (authorizing Commission to order additions or improvements, or changes to existing plant, for the public convenience).

Federal law expressly contemplates the exercise of state regulatory authority over mixed-use access facilities such as those involved in the State Complaints. For example, Section 261(c) of the Communications Act, enacted in 1996, provides that

“[Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of . . . exchange access, as long as the State’s requirements are not inconsistent with this part or the Commission’s regulations to implement this part.]”

Similarly, Section 253(b) of the Act recognizes “the ability of a State to impose . . . requirements necessary to . . . ensure the continued quality of telecommunications services, and safeguard the rights of consumers,” provided that the requirements are competitively neutral and otherwise consistent with Section 254 of the Act. In light of these statutory provisions, U S WEST’s exclusive jurisdiction claim must fail.

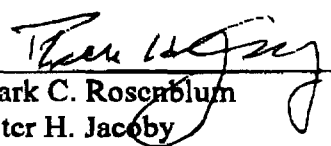
U S WEST’s preemption claim is equally misplaced. As the Supreme Court explained in Louisiana PSC v. FCC,

“Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, . . . when there is outright or actual conflict between federal and state law, . . . where compliance with both federal and state law is in effect physically impossible, . . . where there is implicit in federal law a barrier to state regulation, . . . where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law, . . . or where the state law stands as an obstacle to accomplishment and execution of the full objectives of Congress.”

476 U. S. at 368-369 (1986)(citations omitted). The Petition fails to satisfy any of these criteria. As shown above, rather than exclusively occupying the field, the Telecommunications Act expressly preserves state authority to regulate service quality for intrastate services. Moreover, U S WEST has identified no actual, imminent or concrete conflict between the state commissions’ exercise of jurisdiction over the State Complaints and any federal policy, decision or rule. Absent such a showing, the Petition fails to make out a basis for preempting the state commissions’ authority here.

In short, there plainly is *concurrent* federal and state jurisdiction over the facilities in question here, owing to their multi-jurisdictional character. Although the Commission certainly may exercise its jurisdiction in respect of this matter, there is no basis in law or in policy for the Commission to preclude the states from exercising theirs. Yet U S WEST's Petition would require precisely that result: the dismissal of the State Complaints that AT&T has filed, and that state regulators are now in the process of adjudicating. AT&T therefore requests that the Commission deny U S WEST's Petition.

Respectfully submitted,



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April 24, 2000

CERTIFICATE OF SERVICE

I, Denise M. Dagostino, do hereby certify that on this 24th day of April, 2000, a copy of the foregoing "AT&T's Response to U S West's Petition for Declaratory Ruling" was served by U.S. first-class mail, postage prepaid, on the parties listed below.

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April 24, 2000